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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JEFFREY PREST,

12 Plaintiff,

13 vs.

13 JULIE JERMSTAD, ANDERS
14 JERMSTAD,

15 Defendants.

CASE NO. 07cv1771 WQH (BLM)

ORDER

16 HAYES, Judge:

17 The matter before the Court is the Motion for an Order Requiring Payment of Costs in
18 Previously-Dismissed Action and Staying Further Proceedings (Doc. # 15).

19 **Background**

20 In October 2005, Plaintiff Jeffrey Prest (“Prest”) filed a lawsuit in state court against
21 Defendant Julie Jermstad (“Jermstad”) alleging that he suffered injuries as a result of being
22 exposed to toxic levels of lead while living in a house he rented from Jermstad. *Mot. for Costs*,
23 p. 1. Prior to the state court trial, Prest sought leave to add Jermstad’s son, Anders, as an
24 additional party defendant. The state court denied the motion, finding that Prest was
25 unjustifiably delayed in bringing the motion. *Id.* at 3. Prior to the state court trial, Prest also
26 moved for an order permitting him to add a newly discovered expert linking Prest’s alleged
27 injuries to lead. The state court denied the motion, finding that Jermstad would be
28 substantially prejudiced by adding the expert just prior to trial. *Id.* On September 5, 2007,
counsel for Jermstad received a letter stating that Prest would voluntarily dismiss his state

1 court action and re-file the matter in federal court based on the state court's denial of Prest's
2 motion to add Anders as an additional party defendant and add the newly discovered expert.
3 *Id.* On or about September 6, 2007, the state court entered the voluntary dismissal of Prest's
4 action. *Id.* Following dismissal, Jermstad moved the state court for an award of attorneys'
5 fees and costs incurred in connection with the state court action. On December 7, 2007, the
6 state court awarded Jermstad \$11,574.00 in costs and \$95,550.00 in attorneys' fees.

7 On September 10, 2007, Prest initiated the above-captioned action by filing a complaint
8 which asserts the same claims as those asserted in the state action and names Anders Jermstad
9 as a party defendant (Doc. # 1).

10 On January 3, 2008, Jermstad filed the Motion for an Order Requiring Payment of Costs
11 in Previously-Dismissed Action and Staying Further Proceedings ("Motion for Costs").
12 Jermstad requests that the Court order Prest to pay Jermstad \$39,487.25 for reasonably-
13 incurred attorneys' fees and unusable costs of the previously-dismissed state court action,
14 pursuant to Rule 41(d) of the Federal Rules of Civil Procedure. Jermstad also requests that the
15 Court stay the case until Prest has paid the award of costs and attorneys' fees, pursuant to Rule
16 41(d).

17 Analysis

18 In support of the Motion for Costs, Jermstad states that she was a named defendant
19 in the state action and is also a named defendant in the federal action, and that the claims
20 alleged in both cases are identical. Jermstad states that she incurred significant expenses in
21 defending the state court action, "a good portion of which will not contribute to her defense"
22 in the federal action. *Mot. for Costs*, p. 5; *Reply*, p. 6. Jermstad states that "Prest dismissed
23 the state court action in an admitted effort to obtain an unfair advantage over Jermstad by
24 having his case heard in a more favorable forum." *Id.* Jermstad states that Prest fails to
25 adequately demonstrate his lack of resources to pay an award of costs and fees. Jermstad
26 requests that the Court order Prest to pay the costs incurred in the previously-dismissed state
27 court action, pursuant to Rule 41(d) of the Federal Rules of Civil Procedure. Jermstad
28 contends that her reasonably-incurred attorney's fees should be included in an award of costs

1 made pursuant to Rule 41(d). Jermstad contends that “the fact that Jermstad received a state
 2 court award of costs and attorneys’ fees is irrelevant to this motion,” and that “[a]ny overlap
 3 between the costs and fees awarded in the state court action and the costs and fees sought by
 4 this motion is immaterial to an appropriate” Rule 41(d) analysis. *Reply*, p. 5-6. Jermstad
 5 requests that the Court stay this action until Prest has paid any costs and fees imposed by the
 6 Court pursuant to Rule 41(d).

7 Prest contends that his voluntary dismissal of the state action and filing of the federal
 8 action “was neither forum-shopping nor in bad faith” because the “dismissal was wholly a
 9 consequence of the eleventh-hour discovery of new expert opinion of potentially great
 10 importance,” which “came to plaintiff’s attention too late to be included in the state court
 11 proceeding.” *Opposition*, p. 5. Prest also states that the state court “denied plaintiff’s motion
 12 because to have granted it would have pushed the case beyond the two-year trial limit imposed
 13 by state law on the Superior Court.” *Id.* Prest also contends that an award of fees and costs
 14 is inappropriate because Jermstad has already been awarded attorneys’ fees and costs incurred
 15 in the state action, and Jermstad has failed to show that she seeks an award of fees unrelated
 16 to the fees in the state action. *Id.* at 6-7. Prest contends that Jermstad’s request for a stay
 17 should be denied because “Plaintiff lacks the resources to pay either the costs sought by
 18 defendant or the fees sought by defendant” such that “[s]taying the action until those costs and
 19 fees were paid would effectively end the case.” *Id.* at 7.

20 Rule 41(d) of the Federal Rules of Civil Procedure provides:

21 If a plaintiff who previously dismissed an action in any court files an action
 22 based on or including the same claim against the same defendant, the court:
 23 (1) may order the plaintiff to pay all or part of the costs of the previous action;
 and
 24 (2) may stay the proceedings until the plaintiff has complied.

25 Fed. R. Civ. P. 41(d). Rule 41(d) “conveys broad discretion on federal courts to order stays
 26 and payment of costs” and “neither is mandatory.” *Esquivel v. Arau*, 913 F. Supp. 1382, 1386
 27 (C.D. Cal. 1996). Rule 41(d) is “intended to serve as a deterrent to forum shopping and
 28 vexatious litigation.” *Chien v. Hathaway*, 1994 U.S. App. LEXIS 3365 (9th Cir.) (quoting
 Simeone v. First Bank Nat’l Ass’n, 971 F.2d 103, 108 (8th Cir. 1992). As a general rule, a

1 court may refuse to order a stay pending the payment of costs “if it appears that there was a
 2 good reason for the dismissal of the prior action or that the plaintiff is financially unable to pay
 3 the costs.” *Zucker v. Katz*, 708 F. Supp. 525, 539 (S.D.N.Y. 1989) (quoting 9 C. Wright &
 4 A. Miller, Federal Practice and Procedure § 2375 at 244 (1971)).

5 In opposition to the Motion for Costs, Prest submitted the declaration of his attorney,
 6 Michael W. Palmer (Doc. # 18). Palmer attests that there was good reason for dismissing the
 7 state court action. Palmer attests:

8 Shortly before the state court action was to come to trial, we discovered an
 9 expert witness who could provide important testimony relating to the causation
 10 of plaintiff’s injuries, and to his damages. We immediately sought leave to
 11 amend our expert witness list and offered to make the prospective witness
 12 immediately available for deposition, at our expense. Leave was denied
 13 We had simply come across this witness too late in the day.

14 My co-counsel and I decided that the testimony of the prospective witness was
 15 sufficiently important that we should dismiss the state case, and re-file in federal
 16 court, where we would be free to name the witness *ab initio*. . . .

17 Our wish to secure the testimony of this new expert was the only reason that we
 18 dismissed the state case.

19 Palmer Decl., p. 2. Prest attests that he is financially unable to pay the fees and costs requested
 20 by Jermstad. Prest attests:

21 I do not have resources to pay [the costs and fees requested by Jermstad], nor is
 22 it likely that I will have the means to do so in the foreseeable future. My savings
 23 have been exhausted. For the past two years, and at the present time, my sole
 24 source of income has been disability payments of slightly more than \$1,000 per
 25 month

26 If the court orders me to pay either the costs or fees that defendant seeks, and
 27 also stays this action until such amounts are paid, that will be tantamount to
 28 deciding that this action will never proceed.

Prest Decl., p. 2.

Prest has provided good reason for voluntarily dismissing the state action and refileing
 in federal court. Prest has also demonstrated that he is financially unable to pay the fees and
 costs incurred the state court action. The Court concludes that Prest’s conduct does not
 constitute vexatious litigation or forum shopping. The Court also notes that the state court has
 already awarded Jermstad fees and costs incurred in the state court action. The Court declines
 to exercise its discretion under Rule 41(d) to order Prest to pay the costs of the previous state

1 court action and stay the proceedings until Prest has complied.

2 **Conclusion**

3 IT IS HEREBY ORDERED that the Motion for an Order Requiring Payment of Costs
4 in Previously-Dismissed Action and Staying Further Proceedings (Doc. # 15) is **DENIED**.

5 DATED: May 7, 2008

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7 **WILLIAM Q. HAYES**
8 United States District Judge
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